U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 17Sep2002

CASE NO.: 2000-BLA-655

IN THE MATTER OF:

CLARA FAYE ENSOR, Widow of
RALPH ENSOR (Deceased Miner)

v.

COWIN & COMPANY, INC.

Employer

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS

Party-in-Interest

APPEARANCES:

Clara Faye Ensor, Pro Se

Joseph B. Luckett, Esq.

For the Director

BEFORE: Lee J. Romero, Jr.
Administrative Law Judge

DECISION AND ORDER

This matter involves a claim filed by Clara Faye Ensor (Mrs. Ensor) for survivor benefits under Title IV of the Federal Coal Mine and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977 (the Act), 30 U.S.C. § 901, et seq., and the regulations thereunder at Title 20 of the Code of Federal Regulations (CFR). Benefits are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis, or to survivors of persons who died due to pneumoconiosis. Pneumoconiosis is a dust disease of the lung arising from coal mine employment and is commonly known as black lung.

Issues raised by Cowin and Company, Inc. (Cowin) and the Director of the Office of Workers' Compensation Programs (OWCP) could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on June 3, 2002 in Panama City, Florida. At the hearing, all parties in attendance[1] were afforded the opportunity to offer testimony, introduce documentary evidence,[2] and submit post-hearing briefs in support of their positions. Mrs. Ensor testified and was allowed the opportunity to locate and submit a medical opinion after the formal hearing for a determination on admissibility at that time.[3] Director offered seventeen exhibits, which were admitted, including: the survivor's claim; a statement of decedent's earnings; a marriage certificate; a death certificate; medical records of the decedent; a notice of initial finding; a notice of claim; correspondence between Director, Cowin, and Mrs. Ensor; the decedent's closed LM1 claim for benefits in 1983; and a CM-1025 package summarizing issues in dispute. Two Administrative Law Judge exhibits were received which included Cowin's Motion for Summary Decision and its attached five exhibits, including: employment data concerning the decedent; abandonment information concerning decedent's claim for benefits in 1983; interrogatories answered by Mrs. Ensor; and a notice of unavailable films from the hospital where decedent died.

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[1] Employer Cowin did not appear at the formal hearing.

[2] References to the transcript and exhibits are as follows: Trial transcript- Tr.___; Claimant's exhibits- CX-___, p.___; Employer's exhibits- EX-___, p.___; Director's exhibits- DX-___, p.___; Administrative Law Judge Exhibit- ALJX-___, p.___.

[3] On June 10, 2002, Mrs. Ensor submitted a medical report of Dr. Victor M. Ortega dated November 10, 2000, as Claimant's Exhibit No. 1 (CX-1). Director offered no objection; however, on June 10, 2002, Cowin filed an objection to the receipt of CX-1 arguing that it was untimely submitted in violation of the rules of discovery and the regulatory requirements applied to black lung claims. Cowin argued it requested such information well before the formal hearing, but Mrs. Ensor failed to produce or exchange such information in violation of the discovery request and as required by the pre-hearing order. Cowin attached copies of several discovery requests and self-addressed, stamped envelopes it sent to Mrs. Ensor prior to the hearing. Although Mrs. Ensor proceeded to the hearing without representation, I found she had not shown good cause justifying her failure to comply with the pre-hearing order in this matter. Accordingly, CX-1 was rejected and placed in a Rejected Exhibits file to preserve the record.

Post-hearing briefs were filed by the parties. The following Findings of Fact, Conclusions of Law, and Order are based on a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and applicable case law.

I. ISSUES

The following unresolved issues were presented by the parties as noted on Form CM-1025 (DX-17, pp. 1-2):

1. Whether Mrs. Ensor's survivor's claim was timely filed.

2. Whether Mr. Ensor was a miner.

3. Whether Mr. Ensor worked as a miner after December 31, 1969.

4. Whether Mr. Ensor worked at least nineteen years in or around one or more coal mines.

5. Whether Mr. Ensor had pneumoconiosis as defined by the Act and the regulations.

6. Whether the pneumoconiosis arose out of coal mine employment.

7. Whether Mr. Ensor's death was due to pneumoconiosis.

8. Whether Cowin is the responsible operator.

II. STATEMENT OF THE CASE

This proceeding involves a survivor's claim for benefits under the Black Lung Benefits Act as amended 30 U.S.C. § 901, et seq. Because Mrs. Ensor filed her application for benefits after March 31, 1980, Part 718 of Title 20 of the CFR applies.[4] This claim is governed by the law of the Sixth Circuit of the United States because the decedent was last employed in the coal industry in Arjay, Kentucky.[5]

A. Claimant's and Decedent's Backgrounds

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[4] 20 C.F.R. § 718.2.

[5] See Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989)(en banc).

Ralph Ensor, was born on June 15, 1916, and worked for Cowin in various digging and tunneling activities from 1962 until 1981. (DX-16, p. 4; DX-2, p. 4; ALJX-2, exhibit 1, pp. 4-5). From 1965 until 1978, Mrs. Ensor lived together with Mr. Ensor. (Tr. 21). The two were married on August 4, 1978. (Tr. 21; DX-3). They remained married until Mr. Ensor's death on February 2, 1990. (Tr. 21; DX-4). Claimant has not since remarried. (Tr. 21).

B. Procedural Background

Initial Living Miner Claim

In July 1983, Mr. Ensor (the Miner) filed a form CM-911, Miner's Claim for Benefits. (DX-16, p. 5). Mr. Ensor also filed a Form CM-911a, History of Coal Mine Employment, in which he identified three mining locations at which he worked. For his first coal mine employment, he listed "Clinchfield Coal Corp. through Cowin & Co. Min. Eng." as the coal mine employer. Id. (DX-16, p. 3). Mr. Ensor listed his job title as "driller" for the relevant period of 1963 to February 1965. Id. For his second period of coal mine employment, Mr. Ensor listed "Cement Solvent through Cowin & Comp." as the coal mine employer. Id. He identified his job title as "driller" for the period from September 1966 to October 1968. Id. For his third coal mine employment, Mr. Ensor identified "Eastover Mining Corp. Div. Of Duke Power through Cowin & Comp." as the coal mine employer. Id. Mr. Ensor listed his job title as "driller" for the period of 1979 to March 1981.

On September 16, 1983, OWCP issued a Notice of Abandonment requesting proof of the alleged eight years of coal-mine employment from 1963 to 1981, a certificate of birth and marriage for Mr. Ensor's wife, and an explanation about the failure to take medical examinations authorized and requested on August 8, 1983. (DX-16, p. 2). On November 3, 1983, an Order of Abandonment was issued because Mr. Ensor did not provide the information requested in the September 16, 1983 notice and failed to attend a requested medical evaluation. (DX-16, p. 2). Cowin maintains it never received notice of this claim, and the record is otherwise devoid of any evidence that Cowin was served.

Present Survivor Claim

On April 12, 1999, Mrs. Ensor filed a Survivor's Form for Benefits with the Director. (DX-1, p. 1). On August 12, 1999, OWCP mailed a Notice of Claim to Cowin, advising Cowin it had been identified as the putative responsible operator in the claim. (DX-7).

On September 27, 1999, OWCP notified Mrs. Ensor by a Notice of Initial Finding that she may be entitled to benefits from Cowin, pending challenges Cowin might raise. (DX-6, p. 1). Relying on evidence including the only available medical records from treatment of Mr. Ensor during 1988 to 1990, OWCP specifically found that Mr. Ensor "became totally disabled/died" from pneumoconiosis caused by coal mine employment on February 2, 1990. (DX-6, p. 3). OWCP found that Cowin was the responsible operator liable to pay benefits under the Act from February 1, 1990, including attendant charges and fees incurred by the Department of Labor (DOL) in developing the claim. Id. Additionally, OWCP found that Mrs. Ensor proved 19 1/3 years of coal mine employment. (DX-6, p. 10).

On October 20, 1999, Cowin responded to the Notice of Claim with an Operator Controversion. (DX-8). Cowin denied liability for Mrs. Ensor's Survivor's benefits claim asserting: Cowin was not an operator with whom Mr. Ensor had the most recent period of cumulative employment of one year; Cowin was not an operator of a mine or other covered facility for any period after June 30, 1973; and Mr. Ensor was not employed by Cowin during the times alleged on the claim form. (DX-8, p. 2). Cowin also maintained: the claim was not timely filed; Mr. Ensor did not have pneumoconiosis; Mr. Ensor was not totally disabled by pneumoconiosis; Mr. Ensor's pneumoconiosis was not caused by coal mine employment; and Mr. Ensor's death was not due to pneumoconiosis. Id. Further, Cowin challenged the validity of 20 C.F.R. § 725.202(a). (DX-8, p. 3). On October 25, 1999, OWCP acknowledged receipt of Cowin's Controversion and allowed Cowin sixty days, as requested, to submit evidence supporting its contested issues. (DX-9).

On December 3, 1999, Cowin requested dismissal from further participation in the claim. (DX-10). Cowin contended the length of time which passed between Mr. Ensor's death and the filing of the claim undermined, if not compromised, Cowin's defense of the claim. Id. Specifically, Cowin alleged that it believed liability was precluded by the statute of limitations, the doctrine of laches, and by fundamental constitutional protections. Id. In its request for dismissal, Cowin argued that Mr. Ensor was last employed by Cowin in 1981, seventeen years before the instant claim was filed, and Cowin never had notice of any pending claim during the interim period. Id. Cowin added, "to our knowledge, DOL has never offered an interpretation of the Act or its regulation in a setting where a significant amount of time elapsed between the miner's death and the widow's filing of a claim." (DX-10, p. 3). Consequently, Cowin asserted it would be unreasonable to employ absolutely no time limit on the filing of a widow's claim. Id.

Cowin further asserted the only available medical data consisted of the records of treatment during 1988-1990, and any X-rays referenced in those records were no longer in existence. Id.

Cowin also offered evidence that no autopsy was performed. (DX-10, pp. 5-6). Because it alleged Mr. Ensor was apparently never evaluated specifically to determine the existence of an occupational disease, Cowin challenged the conclusions of Mr. Ensor's treating physician as based on "scant evidence." (DX-10, p. 2). Cowin refuted the conclusions of the treating physician, relying on: the absence of any mention of pneumoconiosis in the X-ray reports from 1988 to 1990; medical records from 1988 to 1990 indicating Mr. Ensor's "heavy smoking in the past;" and diagnoses by the attending physician during 1988 to 1990 without explanations. Id.

Alternatively, Cowin challenged the determination that Mr. Ensor should be credited for 19 1/3 years of coal mine employment. Id. Cowin argued that Mr. Ensor engaged in covered coal mine employment only to the extent that he was exposed to dust conditions comparable to those experienced by coal miners, relying on 30 U.S.C. § 902(d).[6] Cowin further argued that the regulatory presumption of dust exposure may be rebutted by evidence addressing the particular conditions at the employee's worksite, citing 20 C.F.R. § 725.202 (a).[7] Accordingly, Cowin alleged that the "DOL's calculation of the length of Mr. Ensor's employment is questionable." (DX-10, p. 2).

On December 9, 1999, OWCP responded to Cowin's request for dismissal. (DX-11). OWCP recognized Cowin's argument as a challenge to timeliness, "based on the fact that the claimant did not file her survivor's claim until nine years after the miner's death." (DX-11, p. 1). OWCP "agree[d] that the time lapse may present some difficulty in [Cowin's] development of the case;" however, OWCP offered that it had "no authority to dismiss Cowin & Company, Inc. for this reason alone." Id. OWCP added that "[b]oth

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[6] 30 U.S.C. § 902 (d) provides:

> The term "miner" means any individual who works or who has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.

[7] 20 C.F.R. § 725.202 (a) provides in pertinent part:

> There shall be a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner. This presumption may be rebutted by proof....

the Black Lung Act and the Department of Labor's implementing regulations indicate that there is no time limit on the filing of survivors' claims." Id. Specifically, OWCP relied on a previous three-year time limit for filing survivor's claims, which was removed when Congress amended Section 422 in 1978, and on 20 C.F.R. § 725.308(a), which provides in pertinent part, "There is no time limit on the filing of a claim by the survivor of a miner." In response to Cowin's argument that DOL had not addressed the issue, OWCP offered the case of Alzbeta Ciripova (widow of Andrew Cherep) vs. Director, OWCP, 1 BLR 1-923 (May 25, 1978),[8] where the Benefits Review Board (BRB), based on the 1978 Amendments, reversed an administrative law judge's determination that a widow's claim filed more than thirteen years after the death of a miner was untimely. (DX-11, p. 2). OWCP thus did not accept Cowin's assertions that the claim should have been filed earlier or that Cowin's liability should be relieved pursuant to the doctrine of laches. Id. OWCP consequently denied Cowin's request for dismissal. Id.

On January 25, 2000, OWCP issued a Notice of Determination, in which it found: (1) Mrs. Ensor was entitled to Survivor's benefits from the effective date of February 1, 1990, when Mr. Ensor died; (2) based on his Social Security earnings record, Mr. Ensor worked for more than nineteen years as a coal miner, all of which was for Cowin, a coal mine construction firm; (3) Mrs. Ensor was an eligible survivor; (4) Cowin was the responsible operator; (5) medical entitlement was based on the death certificate and other medical records implicating coal workers' pneumoconiosis as a significant factor leading to the death of Mr. Ensor; (6) Cowin controverted the initial finding of entitlement on October 22, 1999; (7) no evidence had been submitted by Cowin other than a duplicate copy of the death certificate, and Cowin offered some arguments, which were addressed by OWCP in its letter of December 9, 1999; and (8) because no additional evidence was submitted subsequent to the initial finding of entitlement, the decision must be affirmed. (DX-12, pp. 1-2). In its initial determination, OWCP provided that Cowin should begin payment within thirty days of the notice, failure for which would result in benefits being paid from the Black Lung Disability Trust Fund (the Fund). Id. The notice

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[8] In Ciripova, the Benefits Review Board stated:

> Suffice it to say that Section 422 as now amended effectively removes all time limitations on the filing of survivors' claims under the Act. Accordingly, the finding of the administrative law judge that the claim is barred is vacated.

1 BLR 1-923, 924.

provided Cowin would be responsible to reimburse the Fund for all payments made up until that time, including interest, penalties, and attorney fees. (DX-12, p. 2).

On February 22, 2000, Cowin responded to the Notice of Initial Determination, rejecting OWCP's conclusions that pneumoconiosis was a significant factor leading to the death of Mr. Ensor. (DX-13). Cowin attached a report by Dr. Gregory J. Fino and Dr. Fino's curriculum vitae. (DX-13, pp. 3-38). Cowin argued Dr. Fino's report indicated coal mine inhalation did not cause, contribute to, or hasten Mr. Ensor's death. (DX-13, p. 1). Rather, Cowin asserted Dr. Fino's report shows the miner died from smoking-related lung disease. Id. Cowin reiterated its arguments concerning the statute of limitations, laches, and fundamental constitutional protections. Id. Cowin disagreed that Ciripova applied to this matter, arguing the BRB in that case "merely took notice of the 1978 Act's limitations provisions in a situation where their application was not an issue." Id. Cowin finally reiterated all bases of controversion previously submitted in this matter. Id.

On March 7, 2000, OWCP notified Mrs. Ensor that Cowin was responsible for payment of benefits, but Cowin disagreed with that determination and requested a formal hearing before an Administrative Law Judge. (DX-14). Because Cowin declined to make payment until the issue was resolved, payments would be made from the Fund until Mrs. Ensor's claim could be finally decided. Id. Payments were authorized to Mrs. Ensor, who would receive $487.40 per month, effective with the month of February 2000. Id. As of March 7, 2000, Mrs. Ensor's total benefits accrued for the period February 1990 through January 2000 amounted to $50,999.20. (DX-14, p. 2). According to OWCP, Cowin would be liable for all of the benefits accrued as well as reimbursement for any amounts paid by the Fund, should OWCP's determination be upheld in appellate decisions. Id.

On March 8, 2000, a copy of the above letter was sent by OWCP to Cowin challenging Cowin's arguments based on Dr. Fino's report. (DX-15). OWCP pointed out its Initial Determination was based on the record as of January 25, 2000. Id. At that time, according to OWCP, Cowin neither offered any additional evidence or requested additional time to submit new evidence pursuant to the sixty-day time frame provided in the letter from OWCP to Cowin on October 25, 1999. Id. Notwithstanding the fact Dr. Fino's report was offered outside the sixty-day limit, OWCP reviewed Dr. Fino's report, which OWCP found unavailing. Id. Specifically, OWCP concluded that the report included inconsistencies and irrelevant review and analysis. Id. Further, because Dr. Fino never actually examined Mr. Ensor, OWCP gave greater weight to the opinions of the examining physicians. (DX-15, p. 2). Thus, because the examining physicians

diagnosed occupational pneumoconiosis, which was also listed on the death certificate as a cause of Mr. Ensor's fatal respiratory arrest, OWCP maintained the original determination was correct, despite Dr. Fino's report. Id.

A hearing on this matter was originally set for November 17, 2000, before Judge Thomas M. Burke in Panama City, Florida. By letter dated October 20, 2000, Cowin filed a motion for summary judgment and requested a continuance. (ALJX-2, p. 1).

On October 30, 2000, Judge Burke issued an order denying the motion for summary judgment and the continuance requested by Cowin. (ALJX-3). Judge Burke found that 20 C.F.R. Section 725.308(a) provides no time limit on the filing of a claim by a miner, and the holding of Ciripova buttressed that conclusion. (ALJX-3, p. 2). Judge Burke further found Cowin's argument that the Survivor's claim was time-barred was contrary to the regulation, and an Administrative Law Judge lacks the authority to challenge the validity of a Department Regulation. Id. Additionally, Judge Burke addressed Cowin's argument that nine years of waiting to file a claim reflects a lack of diligence by Mrs. Ensor. Id. Judge Burke noted the BRB in Ciripova held a survivor's claim was not time-barred despite a thirteen-year interval between the miner's death and the date on which the claimant filed her application for survivor's benefits. Id.

On February 1, 2002, a notice of hearing and prehearing order issued setting the matter for hearing on June 3, 2002 in Panama City, Florida. Because Mrs. Ensor's counsel withdrew on December 13, 2001, a recommendation was made to Mrs. Ensor that she seek a new attorney as quickly as possible to represent her at the hearing. On May 28, 2002, Cowin sought a continuance because Cowin anticipated the hearing would not go forward, due to the absence of counsel on behalf of Mrs. Ensor. OWCP did not object to the motion, but Mrs. Ensor telephonically notified this office that she did not want the hearing continued. Moreover, Mrs. Ensor wished to proceed with the hearing, representing herself. Accordingly, the motion for continuance was denied.

On May 30, 2002, in a letter by facsimile and first-class mail, Cowin elected not to incur the cost of sending representatives to the hearing, despite Mrs. Ensor's stated intent to go forward with the hearing. At the formal hearing, this notice was marked as ALJX- 1 and received into the record. (Tr. 7). Cowin waived cross-examination of Mrs. Ensor and requested a decision to be made on the record. Id. Cowin advised it would rely on exhibits formerly introduced in its motion for summary judgment filed on October 20, 2000, and did not intend to submit additional evidence or object to the admission of Director's Exhibits 1

through 17. Id. Further, Cowin objected to the introduction of any additional evidence into the record on the basis of the failure to exchange it in advance of the hearing. Id. Cowin asserted it did not waive its challenges to any of the issues in dispute, and maintained its position that Mrs. Ensor is not entitled to benefits for which Cowin is not otherwise liable. (ALJX-1, p. 3). Cowin requested leave to submit a post-hearing brief thirty days after receipt of the hearing transcript should the hearing proceed. Id.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Procedural Issues

Timeliness

Cowin consistently maintained and continues to argue that its liability is precluded by the statute of limitations, the doctrine of laches, and due process. (ALJX-2, pp. 5-20). Cowin contends a finding in its favor on these three issues will result in the transfer of liability for the payment of benefits to the Fund without further consideration of the merits of Mrs. Ensor's claim.[9]

Statute of Limitations

Under 20 C.F.R. § 725.308(a), there is no statute of limitations for a survivor's claim. Cowin contends that the regulation is invalid. (Employer's Post-Hearing Brief, p. 12). Specifically, Cowin asserts that it would be unreasonable to interpret the Reform Act to mean that there is absolutely no time limit on the filing of a widow's claim because of other changes created under the 1981 amendments, including the 25-year widow's presumption of Section 411(c)(5) of the 1978 Act that was made inapplicable to any claim filed more than 180 days after the effective date of the 1981 amendments. (Emp. Post-Hrg. Br., p. 11). Cowin further asserts that the absence of a specified period of limitations in the United States Code does not necessarily mean that Congress intended there to be none. (Emp. Post-Hrg. Br., p. 10). Cowin recognizes that the District Director and ALJ Burke relied on 20 C.F.R. § 725.308(a) and the holding of Ciripova to support the absence of any time frame within which a survivor's claim must be filed under the Act. Id. Cowin asserts Ciripova

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[9] See Lane Hollow Coal Co. v. Director, OWCP, 137 F.3d 799, 808 (4th Cir. 1997) (Because the putative responsible operator could not be lawfully deemed the "responsible operator," claimant's benefits must be paid by the Black Lung Disability Trust Fund).

provides no additional support for OWCP's views, because "the Board's discussion of the Reform Act's new provisions was nothing more than off-hand dicta in a case where the issue was not presented."

Administrative law judges are obliged to execute the regulations which DOL promulgates and cannot rule that such regulations are invalid or unconstitutional. In McCluskey v. Zeigler Coal Co., the BRB considered an argument that it was without authority to consider the validity of an interim presumption on which an administrative law judge relied to award benefits.[10] Relying on the holding of Panitz v. District of Columbia, 112 F.2d 39 (D.C. Cir. 1940), which considered various petitioners' claims challenging the constitutionality of a tax, the BRB employed a two-part test to determine the authority of administrative officers to hear constitutional objections.[11] The first step of the test is whether an administrative official has the inherent power to rule on constitutional objections.[12] The second step is to determine whether the Act or regulations vests the administrative officer with the authority to consider constitutional objections.[13] The BRB concluded that the Board, unlike an administrative law judge, had the authority to determine challenges to the validity of a regulation because the United States Code provided the BRB with the authority to hear appeals raising substantial questions of law or fact, as opposed to administrative law judges, who are limited only to questions of fact.[14]

Later, in Gibas v. Saginaw Mining, the court considered whether the Benefits Review Board, an administrative tribunal within the Department of Labor, is vested with the adjudicatory authority to declare invalid a regulation of the Secretary of Labor.[15] The Court considered the two-part test under Panitz.[16] Regarding whether the BRB was inherently vested with the authority to determine the validity of a regulation, the Gibas court found:

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[10] 2 BLR 1-1248, 1-1250, 1-1259 (1981).

[11] Id. at 1-1258.

[12] Id.

[13] Id.

[14] Id. at 1-1259.

[15] 748 F.2d 1112, 1113 (6th Cir. 1984).

[16] Id. at 1117.

> [C]ourts have refused "to recognize in administrative officers any inherent power to nullify legislative [or executive] enactments because of personal belief that they contravene the [C]onstitution." Panitz, 112 F.2d at 42 (footnote and citations omitted). Rather, administrative agencies are vested only with the authority given to them by Congress. Cf. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-14, 96 S.Ct. 1375, 1391, 47 L.Ed.2d 668 (1976) (rulemaking authority of an administrative agency in charge of administrating federal statute is not the power to make law); Social Security Board v. Nierotko, 327 U.S. 358, 369, 66 S.Ct. 637, 643, 90 L.Ed. 718 (1946) (an administrative agency may not finally decide the limits of its statutory power; this is a judicial function).[17]

The Gibas court concluded, however, that Congress vested the Board with the statutory power to decide substantive questions of law and found that the Board did not act beyond its authority in ruling on the validity of a regulation.[18] Buttressing its conclusion, the court noted,

> Our determination is supported by the clear statutory language of 33 U.S.C. § 921(b)(3), which expressly authorizes the Board "to hear and determine appeals raising a substantial question of law or fact.[19]

The inquiry did not end upon that analysis, because the Gibas court then considered whether the BRB properly invalidated the interim presumption of 20 C.F.R. § 727.203(b)(3).[20] The court concluded that the BRB erred by invalidating the regulation, because the regulation was consistent with the purpose of the Act.[21]

Based on the holdings of McCluskey and Gibas, invalidating a regulation is beyond the authority of the undersigned. Even if I were authorized to invalidate a regulation, Cowin's argument is without merit. Cowin relies on the holding of North Star Steel v. Thomas, 115 S.Ct. 1927 (1995) for the proposition that the undersigned should borrow state statutes of limitations when the federal legislation makes no provisions. In North Star, the court

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[17] Id.

[18] Id. at 1117-1118.

[19] Id. at 1118.

[20] Id.

[21] Id.

considered the WARN act and the proper source of a limitations period for civil actions brought to enforce the Act, and it stated, "For actions brought in Pennsylvania, and generally, we hold it to be state law."[22] Further, the North Star court relied on several cases which similarly held that civil actions brought in district courts should borrow state statutes of limitations.[23] None of the cases on which the North Star court relied involved courts of administrative law; rather the cases involved civil actions under federal causes of action, including: (1) § 101(a)(2) of the Labor Management Reporting and Disclosure Act of 1959;[24] (2) the Racketeer Influenced and Corrupt Organizations Act (RICO);[25] (3) 42 U.S.C. § 1983;[26]
(4) a hybrid suit by an employee against an employer for breach of a collective bargaining agreement and against a union for breach of a duty of fair representation governed by National Labor Relations Act limitations period;[27] (5) the Labor Management Relations Act of 1947;[28] and (6) § 901(a) of Title IX of the Education Amendments of 1972.[29] Because this is a survivor's claim brought before an administrative body rather than a civil action, 20 C.F.R. § 725.308(a) applies. Further, the regulation is valid because it is consistent with the Act's goal of providing benefits

> to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death

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[22] 115 S.Ct. at 1929.

[23] Id. at 1930.

[24] Reed v. Transp. Union., 488 U.S. 319, 109 S.Ct. 621 (1989).

[25] Agency Holding Corp. v. Malley-Duff & Assoc., Inc., 483 U.S. 143, 107 S.Ct. 2759 (1987).

[26] Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1938 (1985).

[27] Del Costello v. Teamsters, 462 U.S. 151, 103 S.Ct. 2281 (1983).

[28] Automobile Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 86 S.Ct. 1107 (1966).

[29] Cannon v. Univ. of Chicago, 441 U.S. 677, 99 S.Ct. 1946 (1979).

or total disability due to pneumoconiosis"[30]

Accordingly, Cowin's argument that 20 C.F.R. § 725.308(a) is invalid would be denied even if the undersigned were imbued with the ability to grant the relief requested.

Lastly, Cowin's assertion that the holding in Ciripova provides no additional support for DOL's views because "the Board's discussion of the Reform Act's new provisions was nothing more than off-hand dicta in a case where the issue was not presented" is equally without merit. In Ciripova, the Board specifically relied on the amendment to reverse an ALJ determination that a survivor's claim was time-barred when she filed her claim thirteen years after the death of her husband:

> Prior to our review of this appeal, the Black Lung Benefits Reform Act of 1977, P.L. 95-239, became effective on March 1, 1978 .... Suffice it to say that Section 422 as now amended effectively removes all time limitations on the filing of survivors' claims under the Act. Accordingly, the finding of the administrative law judge that the claim is time barred is vacated.[31]

Consequently, the holding of Ciripova provides support for the timeliness of Mrs. Ensor's claim, and the statute of limitations argument is inapplicable to Mrs. Ensor's claim.

Laches

Cowin contends the doctrine of laches precludes its liability. Again, based on the Gibas and McCluskey cases, the ability of the undersigned to grant the equitable relief sought by Cowin is limited; however, Cowin's argument will nonetheless be addressed. Specifically, Cowin relies on opinions from the Seventh Circuit Court of Appeals for the proposition that the party asserting the defense must demonstrate: (1) an unreasonable lack of diligence by the party against whom the defense is asserted and (2) prejudice arising therefrom.[32] Likewise, the Supreme Court summarized the

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[30] 30 U.S.C. § 901(a).

[31] Ciripova, 1-BLR at 1-924.

[32] See Hot Wax, Inc. v. Turtle Wax, Inc., 191 F.3d 813 (7th Cir. 1999); Cannon v. Univ. of Health Services, 710 F.2d 351 (7th Cir. 1983); Ligenfelter v. Keystone Consol. Indus., Inc., 691 F.2d 339 (7th Cir. 1982).

same two-part test for laches.[33]

Cowin argues that the nine-year delay in filing Mrs. Ensor's claim after her husband's death reflects a lack of diligence on her part. Cowin points out that nothing prevented Mrs. Ensor from ascertaining her rights and filing sooner. Further, Cowin argues that Mrs. Ensor was aware of her right to file a claim and went so far as to contact Social Security, and it is thus unreasonable to conclude that Mrs. Ensor could not find the time to fill out the proper form. (Emp. Post-Hrg. Br., p. 13). Cowin contends that the evidentiary delay "prejudices Cowin's defenses and potentially will lead to liability where it would not have arisen if the matter had been adjudicated closer to the date of death." Id. Specifically, Cowin points out that the X-rays would likely still have been in existence if the claim had been filed earlier and additional medical records may also have been available. Id. Thus, Cowin argues it should be released from liability.

Mrs. Ensor's delay is lengthy and may have caused an inconvenience for all of the parties involved in this case; however, it is unclear from the record and jurisprudence whether the delay was unreasonable. As previously discussed, there is no statute of limitations on the filing of a survivor's claim. In her answer to an interrogatory, Mrs. Ensor explained:

> Shortly after my husband's death in 1990, I contacted the Social Security Adm. in Cookesville, TN. asking what route I would need to take to apply for my husband's black lung benefits. I was told that I would have to make myself available for interviews and meetings at the descression [sic] of the SS Adm. & black lung. I told them that I would not be able to do this as I worked 5 days a week and I had taken time off for my husband's death and I could not afford financially to miss work as I was my only source of income. At that time, my daughter was living with me and a baby born 10 days after my husband's death. So I was responsible for our up-keep and I was working every shift I could.

(ALJX-2, exhibit 4, p. 2). Further, Mrs. Ensor explained that she did not file a claim sooner because she "had to work every shift" she had and "actually thought [she] waited too long until the Dept. of Labor told [her] there was no time limit...." (ALJX-2, exhibit 4, p. 5). Notably, the claimant in Ciripova filed her claim thirteen years after the death of her husband. Additionally, the

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[33] See Costello v. U.S., 365 U.S. 265 (1965); Galliher v. Cadwell, 145 U.S. 368, 373 (1892).

purpose of the Act is to provide benefits to survivors who were dependents of coal miners who died from pneumoconiosis. Thus, Mrs. Ensor's delay does not appear to rise to an unreasonable level of delay justifying the exercise of equitable powers to deny her the right to pursue a claim for benefits to which she may be entitled under the Act.

Even if Mrs. Ensor's delay amounts to an unreasonable lack of diligence, Cowin must still demonstrate prejudice arising therefrom. Cowin's argument that it has been prejudiced because of the evidentiary problems "that potentially will lead to liability where it would not have arisen if the matter had been adjudicated sooner" is specious. Cowin apparently dismisses the burden of proof that Mrs. Ensor must carry. The argument further assumes that additional evidence would surely buttress its defenses. Cowin overlooks the fact that the missing evidence could arguably support Mrs. Ensor's claim for benefits as well. Moreover, Cowin's argument is inconsistent with its assertions elsewhere in the record that seek to avail Cowin of the benefit of "scant evidence" in the record or its argument that "the limited medical evidence of record does not suffice to carry [Mrs. Ensor's] burden." (ALJX-2, p. 7; Emp. Post-Hrg. Br., p. 6). Consequently, even if Cowin demonstrated an unreasonable lack of diligence by Mrs. Ensor, Cowin failed to demonstrate the requisite prejudice necessary for a laches claim to survive.

Due Process

Cowin argues its fundamental right to due process was violated because of the lapse of time since it last employed Mr. Ensor and the filing of the instant survivor's claim. (Em. Post-Hrg. Br., p. 14). Cowin laments the failure of DOL to notify it of Mr. Ensor's abandoned living miner's claim filed in 1983. Id. Cowin thus argues it had no notice of potential liability until 1999, twenty years since it last employed Mr. Ensor and nine years after Mr. Ensor's death in 1990. Id.

Cowin relies on three appellate court decisions: Lane Hollow Coal Co. v. Director OWCP, supra; Consolidation Coal Co. v. Borda, 171 F.3d 175 (4th Cir. 1999), and Island Creek Coal Co. v. Holdman, 202 F.3d 873 (6th Cir. 2000). A review of these cases does not support Cowin's proposition.

In Lane Hollow, an employer was notified in 1992 of a pending claim three years after the claimant died and 17 years after the claim was initially filed in 1978. In 1994, an ALJ awarded benefits and held Lane Hollow liable for payment.

The BRB affirmed, but the Fourth Circuit concluded that OWCP's

handling of the claim denied Lane Hollow due process. The court explained that merely showing a mine operator received notice of a claim after a claimant's death is not sufficient to establish there was a denial of due process. Rather, a due process violation will not be found unless two conditions are satisfied, i.e., a showing that "notice could have and should have been given" at an earlier time and there must be a showing that by the time the notice was given the litigant no longer had "a fair opportunity to mount a meaningful defense."[34] The court emphasized that this standard does not require a litigant to show "actual prejudice." The opinion noted that the Due Process Clause does not create a right to win litigation, but it creates a right not to lose without a fair opportunity to defend oneself.

In Borda, a claimant filed an initial claim for black lung benefits in 1978. His work history and medical evidence were submitted and resubmitted a number of times, but OWCP denied his claim because there was no evidence supporting his claim. Believing his file lost, the claimant filed another claim in 1988.

After receiving the second application in 1988, OWCP notified the employer for the first time that it was the putative responsible operator. In 1994, the claimant was given a hearing before an ALJ concerning both the 1978 and 1988 claims. The employer was unaware the claimant was seeking benefits under the 1978 claim until the day before the hearing. The employer thus argued that its liability for benefits on the 1978 claim would be constitutionally improper.

In 1996 (18 years after the filing of the first claim), an ALJ issued a decision awarding benefits on both claims. In 1997, the BRB affirmed; however, the Fourth Circuit relied on its earlier Lane Hollow decision to conclude that the OWCP's legal duty, which had not been properly fulfilled, was to act on the claimant's earlier submission and to schedule a hearing on his 1978 claim in a timely manner.

In Holdman, a claimant filed a claim for benefits in 1978. In 1980 an ALJ awarded benefits. The responsible operator, Island Creek, moved for reconsideration. By 1984, it was determined that the record had been lost. An ALJ then denied Island Creek's motion for reconsideration.

In 1985, Island Creek appealed to the BRB, and the claimant later died. In 1989, the BRB ordered OWCP to produce the missing exhibits. OWCP responded that it already forwarded all of its

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[34] 137 F.3d at 807.

records. In 1992, the BRB remanded the case for reconstruction of the record. OWCP failed to comply. In 1994, an ALJ ordered OWCP to show cause why OWCP's failure to produce the missing exhibits should not result in a transfer of liability for the payment of benefits to the Black Lung Disability Trust Fund. OWCP disclaimed fault for the loss of the record and asserted that "it was not in the best interest of justice" for the Trust Fund to pay benefits. The ALJ issued an order directing that benefits be paid from the Trust Fund. The BRB later held that the ALJ erred in transferring liability to the Trust Fund.

On appeal, the Sixth Circuit found that OWCP's loss of the missing documents denied due process to Island Creek and that liability for payment of the claim should be borne by the Trust Fund. The court relied on the Fourth Circuit's holdings in Lane Hollow and Borda. The court's decision to transfer liability to the Trust Fund was thus based on two findings that: (1) one of the litigants (Island Creek) had been denied a fair opportunity to defend itself against the claim for benefits; and (2) this denial was the result of OWCP's failure to properly fulfill its legal duties. According to the court, OWCP's legal duty, which had not been properly fulfilled, was to serve as the "official custodian of all documents related to claims of entitlement to benefits."[35]

Thus, based on the decisions in Lane Hollow, Borda, and Island Creek, both the Fourth and Sixth Circuit's holdings transfer liability for the payment of black lung disability benefits to the Trust Fund in cases where a putative responsible operator successfully establishes: (1) it has been denied a "fair opportunity to defend" itself against the claim for benefits, and (2) the denial was the result of OWCP's failure to properly fulfill one of its assigned duties.

Cowin asserts that it has been denied its fair day in court, given the length of time since the filing of Mr. Ensor's abandoned claim in 1983, his death in 1990, and the first notice to Cowin in 1999. Cowin argues that Mr. Ensor's death precludes it from having Mr. Ensor's medical condition evaluated. Cowin argues Mr. Ensor is precluded from appearing as a witness to testify to his extent of dust exposure and cigarette smoking. Cowin nonetheless retained the services of an expert to challenge the diagnoses of Mr. Ensor's treating physician and to review the entire existing medical records. Further, Cowin was presented the opportunity to appear at the hearing, which it elected to forego for economic efficiency. I thus conclude Cowin has not demonstrated it has been denied a fair opportunity to defend itself against the claim for benefits.

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[35] 202 F.3d at 883-84.

Even if Cowin's contention that its fair opportunity to defend itself succeeded, Cowin's argument is misplaced because Cowin must show that the denial was the result of OWCP's failure to properly fulfill one of its assigned duties regarding this claim. The focus of this claim is the survivor's claim filed in 1999. Nothing in the record suggests Cowin was untimely notified of the survivor's claim. Cowin's argument focuses on the abandoned claim and presupposes that the notice of the living miner's claim in 1983 would have warranted Cowin to incur the cost of preparing evidence for that claim. This argument is simply too tenuous to accept. As Cowin asserts in its brief, courts emphasize that "the would-have-been, could-have-been" scenarios are beside the point. Cowin has not shown that OWCP failed to properly fulfill its assigned duties regarding the survivor's claim. Consequently, this argument is without merit.

B. The Survivor's Claim

Miner

A "miner" is defined as:

> [A]ny person who works or who has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or who has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility.[36]

Further, coal mine construction and transportation workers shall be considered a miner to the extent such individual is or was exposed to coal mine dust as a result of employment in or around a coal mine facility.[37]

In Whisman v. Director, OWCP, 8 BLR 1-96, 1-97 (1985), the BRB established a three-prong test to determine whether a worker is a miner within the meaning of the Act: (1) when the coal with which a miner worked was still in the course of being processed and was not yet a finished product in the stream of commerce (status); (2) the worker performed a function integral to the coal production process, i.e., extraction or preparation, and not one merely ancillary to the delivery and commercial use of processed coal (function); and (3) the work that was performed, occurred in or around a coal mine or coal preparation facility (situs). Some

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[36] 20 C.F.R. § 725.202(a).

[37] 20 C.F.R. § 725.202(b).

courts, including those in the Sixth Circuit, have held that the status prong is subsumed in the function prong of the analysis and, therefore, an individual is considered a coal miner if he or she satisfies the function and situs prongs of the test.[38]

Cowin's employment summary regarding Mr. Ensor's work history identifies three coal mines at which he worked. (ALJX-2, exhibit 1, pp. 4-5). Mr. Ensor worked at the Moss #2 Mine in Virginia from October 13, 1964 until May 12, 1965. Id., pp. 4, 6. He worked at the Shannon Branch Mine in Welsh, West Virginia from October 4, 1966 until October 21, 1967. Id., pp. 4, 14. Mr. Ensor last worked on the Arjay Mine in Arjay, Kentucky from May 25, 1980 until March 6, 1981. Id., pp. 5, 11.

Contracts and descriptions regarding work to be performed by Cowin provide the scope of the projects at the three mines. (ALJX-2, exhibit 1, pp. 6-25). For the Moss #2 mine, Cowin agreed to "sink a shaft 16' x 34'-8" in rectangular cross section... for Chaney Creek Air Shaft - Moss #2 Mine...." Id., p. 6. For the Shannon Branch Mine, Cowin was to excavate a shaft in a vertical line to "approximately 12'-6" below the bottom of the Pocohantas No. 3 Seam of coal, a total distance of 540± feet." Id., p. 14. For the Arjay Mine, Cowin agreed to "construct a combination elevator and exhaust ventilation shaft and the rehabilitation of two slopes and other miscellaneous work." Id., p. 11.

Cowin's employment summary provides, "Mr. Ensor's classifications were miner-driller, laborer." Id., p. 5. Likewise, Mrs. Ensor testified that Mr. Ensor was "a driller, just basically anything that they needed for him to do. He worked with explosives, whatever they needed done." (Tr. 23). Mrs. Ensor testified Mr. Ensor worked underground. Id. Additionally, Mrs. Ensor recalled her husband appeared as "a red-headed black man" upon his return from mining. (Tr. 24). Mrs. Ensor testified about heavy amounts of coal dust residue on Mr. Ensor's clothes: "You had to wash his clothes the last load, and you had to clean the machine afterwards because it had coal dust on it." Id.

Based on the evidence and testimony discussed above, I conclude Mr. Ensor was a "miner" within the meaning of the Act. He

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[38] See Director, OWCP v. Consolidation Coal Co. [Petracca], 884 F.2d 485 (6th Cir. 1988). Likewise, other circuit courts have also found the status prong of the analysis was subsumed in the function prong. See Stroh v. Director, OWCP, 810 F.2d 61 (3rd Cir. 1987); Collins v. Director, OWCP, 795 F.2d 368 (4th Cir. 1986); Mitchell v. Director, OWCP, 885 F.2d 485 (7th Cir. 1988); Foreman v. Director, OWCP, 794 F.2d 569 (11th Cir. 1986).

satisfied the situs prong of the analysis because his work was performed "in or around a coal mine" for the three mining projects. The excavating and construction at the coal mines satisfy the function prong of the analysis in that they were "integral to the extraction and preparation of unprocessed coal." Mrs. Ensor's testimony regarding the extent of coal dust exposure further supports a finding that Mr. Ensor's work constituted coal mine employment.[39]

Whether Mr. Ensor worked as a miner after December 31, 1969

Direct employer liability for payment of claims can only result where the miner ceased coal mine employment after December 31, 1969.[40] Mrs. Ensor recalled Mr. Ensor worked for Cowin until he retired in 1981. (Tr. 38). The Social Security earnings statement reflects that Cowin paid Mr. Ensor $6,876.80 in 1981. (DX-2, p. 3). Cowin's employment summary regarding Mr. Ensor's work at the Arjay Mine provides Mr. Ensor worked from May 25, 1980 until March 6, 1981. (ALJX-2, exhibit 1, p. 5). As discussed above, Mr. Ensor's work at the mine satisfies the function and situs prongs of the determination of whether a person satisfies the definition of a "miner" under the Act. Consequently, Mr. Ensor worked as a miner after December 31, 1969.

Length of Mr. Ensor's Coal Mine Employment

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[39] 20 C.F.R. § 725.101(a)(19) was amended in December 2000 to provide coverage for persons exposed to "coal mine dust" as opposed to merely "coal dust." The DOL explained:

> This change makes the regulation consistent with the Department's long-held position that the occupational dust exposure at issue under the BLBA is a total exposure arising from coal mining, and not only exposure to coal dust itself.

Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,958 (Dec. 20, 2000). See Garrett v. Cowin & Co., Inc., 16 BLR 1-77, 1-80 (1990) (While the definition of coal mine dust includes dust generated during the extraction or preparation of coal, this definition is not limited to dust generated in that manner, but may include dust which arises from other activities such as coal mine construction work).

[40] 20 C.F.R. § 725.492(a)(3) (1999). 20 C.F.R. § 725.2 provides that amended 20 C.F.R. § 425.492 does not apply to claims outstanding as of January 19, 2001.

On January 25, 2000, in a Notice of Initial Determination, OWCP determined Mr. Ensor worked "for more than 19 years as a coal miner, all of which was for [Cowin]." (DX-12, p. 8). OWCP found that Mr. Ensor's employment history was documented by Social Security earnings records reflecting employment with Cowin from 1962 until 1981. Id. Cowin disputes the length of Mr. Ensor's coal mine employment, based on its employment records. In support of its contention, Cowin offers an affidavit and supporting exhibits by Mr. John D. Moore, Vice- President of Human Resources and Safety for Cowin. (ALJX-2, exhibit 1, pp. 1-3). The affidavit provides details of Mr. Ensor's employment with Cowin "prepared from payroll records which are kept on microfilm." Additionally, Mrs. Ensor testified regarding the nature of her husband's employment with Cowin. (Tr. 21-24, 37-39). Further, Mr. Ensor provided details of his employment with Cowin on his Form CM-911a in 1983 (DX-16, p. 3). The record also contains other cogent evidence, including a death certificate. (DX-4, p. 1).

The analysis of the entire record invokes various rules used to consider the evidence. Affidavits concerning the claimant's length of coal mine employment constitute relevant evidence which the administrative law judge may consider within his or her discretion,[41] despite the hearsay character of the evidence.[42] Coal mine employment forms filed by the miner need not be corroborated to be found credible and, standing alone, may be the basis for a finding of length of coal mine employment.[43] A finding concerning the length of the miner's employment may be based exclusively on the claimant's own testimony where it is uncontrodicted and credible.[44] Similarly, where the Social Security earnings record is found to be incomplete, it is reasonable to credit the claimant's uncontradicted testimony in establishing length of coal mine employment.[45] Other documentation that lists the miner's occupation are relevant to his status of employment.[46]

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[41] Clayton v. Pyro Mining Co., 7 BLR 1-551 (1984).

[42] Williams v. Black Diamond Mining Co., 6 BLR 1-188 (1983).

[43] Harkey v. Alabama By-Products Corp., 7 BLR 1-26 (1984).

[44] Bizarri v. Consolidation Coal Co., 7 BLR 1-343 (1984); Coval v. Pike Coal Co., 7 BLR 1-272 (1984); Gilliam v. G & O Coal Co., 7 BLR 1-59 (1984).

[45] Niccoli v. Director, OWCP, 6 BLR 1-910 (1984).

[46] Smith v. Director, OWCP, 7 BLR 1-370 (1984). The death certificate provided in the record includes information regarding

Cowin's affidavit regarding Mr. Ensor's work history itemizes fifteen projects on which Mr. Ensor worked for Cowin from June 13, 1962 until March 6, 1981. (ALJX-2, exhibit 1, pp. 4-5). It identifies the three previously discussed coal mine projects at which Mr. Ensor worked. According to the affidavit, Mr. Ensor was "off sick" during the Shannon Branch Mine project from July 7, 1967 to September 26, 1967. The affidavit further provides that "the remainder of his work for Cowin was in other types of mine construction, such as zinc and borax, and in non-mine construction, such as tunnel, dam and highway construction." Id., pp. 1-2. The remaining twelve projects involve non-coal mining activities according to Cowin's records:

Date	**Client**	**Location**	**Description**
06/13/62 to 07/24/63	Southern Railway Systems	Swanea, NC	Tunnel
08/06/63 to 09/04/63	North Carolina Highway Dept.	Haywood, NC	
09/09/63 to 10/09/63	Corps of Engineers	Georgia	Carters Dam
06/09/64 to 08/04/64	North Carolina Highway Dept.	Haywood, NC	
06/05/64 to 06/08/64	Southern Railway Systems	Lake City, NJ	Railroad Tunnel
06/09/64 to 08/04/64	North Carolina Highway Dept.	Haywood, NC	
08/12/64 to 09/15/64	U.S. Steel	Jefferson City, TN	Zinc Mine

Mr. Ensor's occupation and industry. (DX-4). Section 12a of that certificate asks for "DECEDENT'S USUAL OCCUPATION (Give kind of work done during most of working life. Do not use retired)." Id. "Engineer" is provided as the response. Id. Section 12b of the certificate asks for "KIND OF BUSINESS/INDUSTRY." Id. The response to this section is "Mining." Id. While not entirely illuminating, this appears consistent with testimony and evidence that Mr. Ensor worked in various capacities associated with mining.

05/24/65 to 09/28/66	American Zinc	Mascott, TN	Immel Mine
10/21/67 to 09/09/69	Duke Power	South Carolina	Tunnel
09/10/69 to 06/23/70	New Jersey Zinc	Carthage, TN	
08/26/70 to 09/16/78	New Jersey Zinc	Carthage and Gordonsville, TN	
09/17/78 to 05/24/80	U.S. Borax	Sweetwater, TN	

Id., pp. 4-5. Consequently, Cowin maintains that, while Mr. Ensor worked for the company from 1962 until 1981, his actual coal mine employment was limited to a fraction of that time.

Likewise, Mrs. Ensor testified Mr. Ensor worked at other places besides coal mines for Cowin. (Tr. 39). Mrs. Ensor recalled, "I know that they built the tunnels between Tennessee and North Carolina for the – I-40...." Id. Mrs. Ensor recalled that she and her husband frequently moved and lived in Tennessee, West Virginia, South Carolina. (Tr. 39-40). She could not recall how much time Mr. Ensor actually spent working at the coal mines for Cowin.[47] Id. Mrs. Ensor stated Mr. Ensor last worked with Cowin for New Jersey Zinc Mines in Carthage, Tennessee at a mine shaft and tunnel. Id. Mrs. Ensor also testified that Mr. Ensor was with Cowin when he retired and that Arjay "could have been from where he was – the company that they had contracted with." (Tr. 38). Mrs. Ensor discussed her recollection of the project Cowin performed for Clinchfield Coal Company (the Moss #2 Mine[48]). (Tr. 22). Thus, from Mrs. Ensor's testimony, Mr. Ensor worked both in and out of coal mine employment while he was employed by Cowin on various jobs across several states.

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[47] Likewise, Mrs. Ensor could not recall employment by Mr. Ensor for C. W. Ellis and Roy Grindstaff trading as Sinkhole Mining from 1957 to 1962. (Tr. 38-39). Social Security records reflect that Mr. Ensor worked for this company from 1957 to 1962.

[48] Mrs. Ensor testified about Cowin's winning bid for the job for Clinchfield Coal Company and the nature of what that job entailed. (Tr. 22). Cowin's employment identifies Clinchfield Coal as the client on the "Cheney Creek Mine #2." (ALJX-2, exhibit 1, p. 4). A contract regarding that project provides that this job is for the Moss #2 Mine. Id., p. 6.

On the Form CM-911a completed in 1983, Mr. Ensor identified the three mining projects Cowin lists on its records. (DX-16, p. 3). For the first coal mine, he listed "Clinchfield Coal Corp. through Cowin & Co. Min. Eng." as the coal mine employer. (DX-16, p. 3). For that site, Mr. Ensor listed his job title as "driller" for the relevant period of 1963 to February 1965. Id. For the second coal mine, Mr. Ensor listed "Cement Solvent through Cowin & Comp." as the coal mine employer. Id. For that site, he identified his job title as "driller" for the period from September 1966 to October 1968. Id. For the third coal mine, Mr. Ensor identified "Eastover Mining Corp. Div. Of Duke Power through Cowin & Comp." as the coal mine employer. Id. For that site, Mr. Ensor listed his job title as "driller" for the period of 1979 to March 1981. Accordingly, the form is consistent with Mrs. Ensor's testimony to the extent that it discusses the Moss #2 project[49] for Clinchfield Coal and the Arjay Mine project for Eastover Mining Corporation. The form supplements Mrs. Ensor's testimony to the extent that it identifies the Shannon Branch Mine project that was performed by Cowin for Semet Solvay. Because it was completed in 1983, the form is a better reflection of the specific coal mine locations than is Mrs. Ensor's June 3, 2002 recollection, which generally discussed Mr. Ensor's coal mine experience without discussing exact coal mine locations.

The Form CM-911a is consistent with Cowin's employment summary to the extent that it identifies the same three mines, but it is inconsistent to the extent that it reflects dates. Cowin's employment summary based on the payroll records is more specific regarding dates of employment as far back as 1963. Accordingly, Cowin's records are entitled to more credit for the length of the particular periods in question. The relevant periods are thus: (1) October 13, 1964 to May 12, 1965; (2) October 4, 1966 to July 7, 1967; and (3) May 25, 1980 to March 6, 1981.

Pursuant to the regulations, a year means a period of one calendar year (365 days or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 "working days."[50] A "working day" means any day or part of a day for which a miner received pay for work as a miner.[51] A "working day" does not include days for which a miner received pay on an approved

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[49] See note 20 supra. Mr. Ensor did not identify the Moss #2 Mine, but he identified Clinchfield Coal, the client on the Moss #2 Mine project.

[50] 20 C.F.R. § 725.101(a)(32).

[51] Id.

leave, such as vacation or sick leave.[52] For purposes of determining whether a miner worked for a year, any day for which a miner received pay while on approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year.[53] The first period of October 13, 1964 to May 12, 1965 is a period of 211 days. The second period of October 4, 1966 to July 7, 1967 is 382 days; however, Cowin's employment summary provides that Mr. Ensor was "off sick[54] from 7/7/67 to 9/26/67." (ALJX-2, exhibit 1, p. 4). That period thus lasted 284 days at a minimum.[55] The third period runs from May 25, 1980 to March 6, 1981, or 285 days. Given the length of each of these periods for which Mr. Ensor was paid, Mr. Ensor worked three years in the coal mines.[56]

Accordingly, OWCP's determination that Mrs. Ensor proved over nineteen years of coal mine employment is not supported by the record. Mrs. Ensor's testimony is congruous with Cowin's records, and that testimony is supported by Mr. Ensor's Form CM-911a as well. Cowin's affidavit based on the employment payroll records establishes three years of coal mine employment. Based on the evidence and testimony, I find Mr. Ensor worked for Cowin between 1962 and 1981 engaged in various capacities on different jobs; however, there are only three coal mine jobs documented by Cowin and Mr. Ensor's Form CM-911a for a total of three years of coal mine employment. (DX-16, p. 3; ALJX-2, exhibit 1, pp. 4-5).

Responsible Operator

Liability for the payment of benefits to eligible miners and

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[52] Id.

[53] Id.

[54] The Social Security records indicate a substantial drop in Mr. Ensor's income from Cowin during that period. (DX-2, p. 3). The statement of earnings is not conclusive whether Mr. Ensor was paid for any of the time that he was off sick.

[55] The 365-day period beginning on October 4, 1966 ends on October 4, 1967. The period provided as "off sick" runs from July 7, 1967 until September 26, 1967, or 81 days. The net number of days is thus 284.

[56] Assuming a five-day work week, each of these periods exceeds 125 working days.

their survivors rests with the responsible operator.[57] An operator is defined as:

> [A]ny owner, lessee or other person who operates, controls, or supervises a coal mine or any independent contractor performing services or construction at such mine..., certain other employers, including those engaged in coal mine construction, maintenance and transportation, shall also be considered to be operators for purposes of this part....[58]

Under the Act, liability for the payment of benefits is imposed upon the employer with whom the miner had the most recent period of cumulative employment of not less than one year.[59] It is OWCP's burden to investigate and assess liability against the proper operator.[60]

OWCP designated Cowin the responsible operator. (DX-7). Cowin challenged that determination, relying on its status as a construction company, not an actual mining company. (DX-10, p. 2). Likewise, Mr. Moore's affidavit for Cowin provides:

> Cowin is a construction contractor and does not operate coal or other types of mines. The above projects were performed under contract with the mining companies, to whom Cowin is unrelated.

(ALJX-2, exhibit 1, p. 2). The regulations provide that an independent contractor which performed services or engaged in construction at a mine may be held liable for the payment of benefits as a coal mine operator with respect to its employees who worked in or around the coal mine or its construction in any period when those employees were exposed to coal dust during their employment with the contractor.[61] The independent contractor's

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[57] 20 C.F.R. § 725.492 (1999). Pursuant to 20 C.F.R. § 725.2, the recent amendment does not apply to §§ 725.491, 725.492, 725.493, 725.494, or 725.495 for claims outstanding as of January 19, 2001.

[58] 20 C.F.R. § 725.491 (1999).

[59] 20 C.F.R. § 725.493(a)(1) (1999). See Snedeker v. Island Creek Coal Co., 5 BLR 1-91 (1982).

[60] England v. Island Creek Creek Coal Co., 17 BLR 1-141 (1993).

[61] 20 C.F.R. § 725.491(c) (1999).

status is not contingent upon the amount or percentage of its work or business related activities in or around a mine, nor upon the number of its employees engaged in such activities.[62] Accordingly, Cowin may be liable for the payment of benefits as a coal mine operator.

For purposes of 20 C.F.R. § 725.493(a), one year of coal mine employment may be established by accumulating intermittent periods of coal mine employment.[63] As mentioned above, Mr. Ensor worked for Cowin in and around three coal mines during his career with Cowin. For each of the relevant periods that he worked at the various mines, Mr. Ensor established more than 125 working days of coal mine employment. Cumulatively, the three coal mine projects exceed one year. The most recent period ended in 1981, when Mr. Ensor retired. Thus, Cowin is the responsible operator as it is the most recent operator who employed Mr. Ensor for a cumulative period of not less than one year.[64]

Elements of Entitlement for a Survivor Claim

Under the Act and implementing regulations, 20 C.F.R. § 718.205, benefits are provided to eligible survivors of a miner whose death was due to pneumoconiosis. To obtain benefits, a surviving claimant must prove several facts by a preponderance of

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[62] Id.

[63] 20 C.F.R. § 725.492(c) (1999).

[64] Other than Mrs. Ensor's testimony regarding Mr. Ensor's coal dust exposure, the record is silent regarding the extent of Mr. Ensor's exposure to coal mine dust during the three particular coal mine operations. For the purpose of establishing the identity of a responsible operator, 20 C.F.R. § 725.492(c) (1999) provides a rebuttable presumption that, during the course of an individual's employment, such individual was regularly and continuously exposed to coal dust. To rebut the presumption, the employer must establish that there were no significant periods of coal dust exposure. Conley v. Roberts and Schaefer Coal Co., 7 BLR 1-309 (1984). The frequency of coal dust exposure must be shown to be so slight that employment with the mine operator could not have caused pneumoconiosis. Harringer v. B & G Construction Co., 4 BLR 1-542 (1982). Cowin proffered no evidence to establish there were no significant periods of coal dust exposure during Mr. Ensor's three-year tenure in the coal mines. Accordingly, Mr. Ensor is presumed to have been regularly and continuously exposed to coal dust during his coal mine employment for the purpose of establishing Cowin as the responsible operator.

the evidence.[65] First, the claimant must establish eligibility as a survivor. A surviving spouse may be considered eligible for benefits under the Act if he or she was married to, and living with, the coal miner at the time of his or her death and has not remarried.[66]

The claimant must then prove the coal miner had pneumoconiosis.[67] Under the Act, the term "pneumoconiosis" is defined as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment."[68] The regulations explain that "pneumoconiosis" includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.[69] Clinical pneumoconiosis consists of those diseases "recognized by the medical community as pneumoconiosis," whereas legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment."[70] The "legal" definition of pneumoconiosis "encompasses a wider range of

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[65] See Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994) (Claimant has the burden of proving the existence of pneumoconiosis, as well as every element of entitlement, by a preponderance of the evidence).

[66] 20 C.F.R. § 718.4 provides "the definitions and usages of terms contained in § 725.101 of subpart A of part 725 of this title shall be applicable to this part." 20 C.F.R. § 725.101(a)(32)(iv)(c) refers to the terms "dependents and survivors" as "those persons described in subpart B of this part." 20 C.F.R. § 725.215 sets forth the spousal relationship criteria and provides the dependency rules. Pursuant to § 725.214(a), the spousal relationship exists if the courts of the state where the miner was domiciled at the time of death would find that the individual and the miner were validly married. Under § 725.215(a), a spouse is deemed dependent if he or she was living with the miner at the time of his or her death.

[67] For survivor claims filed on or after January 1, 1982, an administrative law judge must make a threshold determination as to the existence of pneumoconiosis under 20 C.F.R. § 718.202 (a) prior to determining whether the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205. Trumbo v. Reading Anthracite Company, 17 BLR 1-85 (1993).

[68] 30 U.S.C. § 902(b).

[69] 20 C.F.R. § 718.201.

[70] Id.

afflictions than does the more restrictive medical definition of pneumoconiosis."[71]

Once the determination is made that a miner has pneumoconiosis, it must be determined whether the coal miner's pneumoconiosis arose, at least in part, out of coal mine employment.[72] If a miner who suffers from pneumoconiosis was employed for ten years or more in one or more coal mines, there is a rebuttable presumption that pneumoconiosis arose out of such employment.[73] Otherwise, the claimant must provide competent evidence to establish the relationship between pneumoconiosis and coal mine employment.[74]

The surviving spouse must further demonstrate the coal miner's death was due to pneumoconiosis. For a survivor's claim filed on or after January 1, 1982, the regulations provide four means by which to establish a coal miner's death was due to pneumoconiosis:

1. Competent medical evidence establishes the death was caused by pneumoconiosis,[75] or

2. Pneumoconiosis was a substantially contributing cause or factor leading to the miner's death,[76] or

3. Death was caused by complications of pneumoconiosis,[77] or

4. The presumption in 20 C.F.R. § 718.304 regarding complicated pneumoconiosis applies.[78]

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[71] Cornett v. Benham Coal, Inc., 227 F.3d 569 (6th Cir. 2000) citing Kline v. Director, OWCP, 877 F.2d 1175, 1178 (3d Cir. 1989); Hobbs v. Clinchfield Coal Co., 45 F.3d 819, 821 (4th Cir. 1995).

[72] 20 C.F.R. § 718.203(a).

[73] 20 C.F.R. § 718.203(b).

[74] 20 C.F.R. § 718.203(c).

[75] 20 C.F.R. § 718.205(c)(1).

[76] 20 C.F.R. § 718.205(c)(2).

[77] Id.

[78] 20 C.F.R. § 718.205(c)(3). Under 20 C.F.R. § 718.304, there is an irrebuttable presumption the miner's death was due to

A survivor may not receive benefits if the coal miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless evidence establishes that pneumoconiosis was a substantially contributing cause of death.[79]

Concerning the second means of establishing death due to pneumoconiosis, the BRB and Federal courts of appeal have provided guidance regarding "substantially contributing cause or factor." The BRB stated that, under the provisions of §718.205(c), death will be considered to be due to pneumoconiosis where the cause of death is significantly related to or significantly aggravated by pneumoconiosis.[80] The Third Circuit introduced the proposition that any condition that "hastens the miner's death" is a substantially contributing cause of death for purposes of § 718.205.[81] The Fourth, Sixth, Seventh, and Tenth Circuits similarly adopted this approach.[82] The Sixth Circuit reaffirmed its position, holding that "pneumoconiosis is a substantially contributing cause or factor leading to the miner's death if it serves to hasten that death in any way."[83] Further, 20 C.F.R. § 718.205(c) was amended in December 2000 to include the "hastening death" standard in the regulations.[84] Consequently, if pneumoconiosis actually hastened a coal miner's death, then it is a substantially contributing cause within the meaning of the regulations.

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pneumoconiosis if there is evidence of complicated pneumoconiosis established by X-rays, biopsies or autopsies, or diagnoses by other means that accord with acceptable medical procedures.

[79] 20 C.F.R. § 718.205(c)(4).

[80] Foreman v. Peabody Coal Co., 8 BLR 1-371, 1-374 (1985).

[81] Lukosevicz v. Director, OWCP, 888 F.2d 1001 (3d Cir. 1989).

[82] See Shuff v. Cedar Coal Co., 967 F.2d 9787 (4th Cir. 1992); Brown v. Rock Creek Mining Corp., 966 F.2d 812 (6th Cir. 1993)(J. Batchelder dissenting); and Peabody Coal Co. v. Director, OWCP, 100 F.3d 871 (10th Cir. 1996)(A miner is entitled to benefits if pneumoconiosis hastened the miner's death "to any degree").

[83] Griffith v. Director, OWCP, 49 F.3d 184 (6th Cir. 1995).

[84] 20 C.F.R. § 718.205(c)(5) provides:

> Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.

Thus, a survivor's claim filed after January 1, 1982, must meet four elements for entitlement. The claimant bears the burden of proving these elements by a preponderance of evidence. If the claimant fails to prove any one of these elements, the claim for benefits must be denied.[85] The four elements are: (1) the claimant is an eligible survivor of the deceased miner; (2) the coal miner suffered from pneumoconiosis; (3) the coal miner's pneumoconiosis arose out of coal mine employment; and (4) the coal miner's death was due to coal workers' pneumoconiosis.

Eligible Survivor

The first element of entitlement is establishing eligibility as a survivor. From 1965 until 1978, Claimant lived together with Mr. Ensor. (Tr. 21). The two were married on August 4, 1978. (Tr. 21; DX-3). They remained married until Mr. Ensor's death, and Mrs. Ensor has not since remarried. (Tr. 21). Consequently, I find the record and Mrs. Ensor's uncontested testimony establish that Mrs. Ensor is an eligible survivor.

Existence of Pneumoconiosis

The next element that Mrs. Ensor must prove is that Mr. Ensor actually had pneumoconiosis. Pursuant to 20 C.F.R. § 718.202, the existence of pneumoconiosis may be established by four methods: (1) chest X-rays;[86] (2) autopsy or biopsy report;[87] (3) statutory presumption;[88] or (4) medical opinion.[89]

The record contains insufficient medical evidence to establish

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[85] See Gee v. W. G. Moore and Sons, 9 BLR 1-4 (1986); Roberts v. Bethlehem Mines Corporation, 8 BLR 1-211 (1985).

[86] 20 C.F.R. § 718.202(a)(1).

[87] 20 C.F.R. § 718.202(a)(2).

[88] Under 20 C.F.R. § 718.202(a)(3), a miner is presumed to have suffered from pneumoconiosis if any of the following presumptions apply: (1) 20 C.F.R. § 718.304 (if complicated pneumoconiosis is present, there is an irrebuttable presumption that the miner's death was due to pneumoconiosis); (2) 20 C.F.R. § 718.305 (for claims filed before January 1, 1982, if the miner has fifteen years or more of coal mine employment, there is a rebuttable presumption that total disability is due to pneumoconiosis); and (3) 20 C.F.R. § 718.306 (a rebuttable presumption where a miner files a claim prior to June 30, 1982).

[89] 20 C.F.R. § 718.202(a)(4).

complicated pneumoconiosis necessary to invoke the presumption identified in 20 C.F.R. § 718.304.[90] Specifically, the record contains no diagnoses by chest X-ray, autopsy, biopsy, or other means that would reasonably be expected to yield the necessary results according to reasonable medical procedures. Consequently, there is insufficient evidence to support a finding that Mrs. Ensor is entitled to the irrebuttable presumption that Mr. Ensor's death was due to pneumoconiosis or that he was totally disabled due to pneumoconiosis at the time of his death. Further, Mrs. Ensor filed her claim in 1999, well past the June 30, 1982 and January 1, 1982 threshold dates which allow the presumptions listed in 20 C.F.R. § 718.303 and 20 C.F.R. § 718.305 to apply. Consequently, the statutory presumptions identified in 20 C.F.R. § 718.202 are inapplicable. Mrs. Ensor must therefore establish pneumoconiosis based on the totality of the chest X-ray evidence, autopsy or biopsy reports, and medical opinions.

Medical Evidence

1. Chest X-Ray Reports[91]

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[90] 20 C.F.R. § 718.304 provides for the irrebuttable presumption that a miner's death was due to pneumoconiosis or that a miner was totally disabled due to pneumoconiosis at the time of his death if the miner is suffering or suffered from a chronic disease of the lung which:

> (a) when diagnosed by chest X-ray... yielding one or more large opacities (greater than 1 centimeter in diameter) and would be classified as Category A, B, or C [according to the accepted Classification regimes]; or
>
> (b) when diagnosed by biopsy or autopsy, yields massive legions in the lungs; or
>
> (c) when diagnosed by means other than those specified in paragraphs (a) and (b)... would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein prescribed: Provided, however, that any diagnosis made under this paragraph shall accord with reasonable medical procedures.

[91] The original X-ray films are unavailable, and the results in this table are based on X-ray reports generated by two examiners whose credentials are not provided in the record. The regulations nonetheless provide:

Exhibit, Page	Date of X-Ray	Physician and Qualifications[92]	Diagnosis and Comments
DX-5, p. 42.	1/31/90	Brown	chronic obstructive lung disease and scarring bilaterally
DX-5, p. 36.	1/28/90	Rogers	emphysema and lots of interstitial scarring
DX-5, pp. 25, 34.	11/19/89	Brown	severe chronic lung disease with no evidence of acute disease
DX-5, p. 9.	12/10/1988	Brown	significant pulmonary fibrosis noted bilaterally; decreasing congestive failure with severe chronic changes again noted

> Where the chest X-ray of a deceased miner has been lost, destroyed, or is otherwise unavailable, a report of a chest X-ray submitted by either party shall be considered in connection with the claim.

20 C.F.R. § 718.102(d). Consequently, these reports are considered with the totality of the evidence in the record.

[92] The qualifications of the roentgenologists are not of record.

DX-5, pp. 21, 26.	3/19/88	Brown[93]	increased interstitial markings consistent with congestive failure

2. Pulmonary Function Test(s)

There are no pulmonary function tests of record.

3. Blood Gas Tests

Exhibit, Page	Test Date	Physician	PO_2	PCO_2	Comments
DX-5, p. 39	01/31/1990	Littman	71.7	51	
DX-5, p. 39	02/02/1990	Littman	49	90	

The 1990 results are found in a report which was generated during Mr. Ensor's hospital stay that resulted in his death on February 2, 1990. (DX-5, pp. 38-41). The actual test results for 1990 are unavailable and not of record. The blood gas study produced results at or below the requisite levels in Appendix C of Part 718;[94] however, the results were generated during hospitalization that resulted in a miner's death. The studies may have been affected by other impairments and may actually be unreliable; however, without qualified medical testimony to that effect, neither the Board nor the administrative law judge has the requisite medical expertise to make that judgment.[95] Because there

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[93] The signature for this report includes "Rogers for" Barry J. Brown. (DX-5, p. 21). The record is otherwise unclear regarding which doctor interpreted the X-ray or prepared the report.

[94] Under Appendix C of Part 718, if arterial $_pCO_2$ is above 50(mm Hg), any arterial $_pO_2$ value meets the medical specifications necessary to be found totally disabled in the absence of rebutting evidence.

[95] Jeffries v. Director, OWCP, 6 BLR 1-1013, 1-1014 (1984). The blood gas testing was performed prior to December 2000, and the new regulation at 20 C.F.R. § 718.105(d) is thus

is no medical testimony of record suggesting the blood gas studies are unreliable, their probative value will be weighed with the totality of the evidence.

4. Autopsy and Pathology

There is no autopsy or pathology evidence of record.

5. Medical Opinions and Reports

A. Dr. William Littman

Dr. William Littman,[96] was Mr. Ensor's treating physician from 1988 until Mr. Ensor's death on February 2, 1990. (Tr. 27; DX-5, pp. 3-4, 12-14, 31-32, 36, 38-41). Mrs. Ensor testified Dr. Littman was Mr. Ensor's family doctor who never referred Mr. Ensor to any specialists. (Tr. 28).

Dr. Littman first saw Mr. Ensor on March 19, 1998, when Mr. Ensor was admitted to the University Medical Center in Lebanon, Tennessee (the hospital) with a diagnosis of ventricular tachycardia and sudden death. (DX-5, p. 14). According to the admission report, Mr. Ensor had a history of COPD, nose bleeds, and occasional to frequent PVCs. Id. The report further discussed Mr. Ensor's history of irregular heartbeats, lightheadedness, and an experience of falling to the floor associated with subsequent confusion and momentary loss of vision. Id. The report noted that Mr. Ensor recently visited another hospital for a severe nose bleed. Id. At McFarland Hospital, Mr. Ensor demonstrated symptoms consistent with esophageal reflux and was found to suffer from severe esophagitis that was not malignant. Id. Mr. Ensor's symptoms of severe gastroesophageal reflux improved due to the use of medicines. Dr. Littman discussed Mr. Ensor's social history, which specifically included "Positive for heavy smoking in the past...." Id. Dr. Littman further noted that Mr. Ensor's heart was functioning at a regular rate and rhythm, while Mr. Ensor's lungs indicated mild expiratory wheezing. (DX-5, p. 13). Dr. Littman's final diagnoses included: (1) sudden death, most likely secondary to an episode of ventricular tachycardia; (2) severe COPD; (3) severe esophagitis; (4) malnutrition; (5) lower extremity edema secondary to venous insufficiency and COPD; and (6) bronchitis. (DX-5, p. 12).

Dr. Littman next examined Mr. Ensor during his admission at

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inapplicable, pursuant to 20 C.F.R. § 718.101(b) (2001).

[96] The credentials of Dr. Littman are not of record.

the hospital in December 1988. (DX-5, p. 5). The initial history and physical examination indicated that Mr. Ensor was admitted with exacerbation of COPD and frequent PVCs. Id. According to the admission report, Mr. Ensor's past history included moderately severe COPD, gastroesophageal reflux, diverticulosis, and probable episode of sudden death. Id. Dr. Littman's physical examination of Mr. Ensor's heart provided a "nonpalpable PMI" with regular rate and rhythm, distant heart tones, and no gallop or murmur. Id. Dr. Littman's examination of Mr. Ensor's lungs revealed moderate wheezing throughout inspiration and more so through out expiration. Id. Dr. Littman's discharge summary on December 13, 1988 includes three diagnoses: (1) asthmatic bronchitis; (2) history of peptic ulcer,; and (3) history of ventricular tachycardia. (DX-5, p. 4). During the course of Mr. Ensor's stay at the hospital, he demonstrated gradual improvement associated with treatment including inhalers and medicines until he was stable enough for discharge. Id.

Dr. Littman again examined Mr. Ensor in November 1989, when Mr. Ensor was admitted for chest pain and shortness of breath. (DX-5, pp. 31-32). Dr. Littman noted that Mr. Ensor had "a known prior history of [COPD] and palpable coal miner's pneumoconiosis." (DX-5, p. 31). Dr. Littman noted that Mr. Ensor had a history of severe gastroesophageal reflux with no history of reported nausea, vomiting, fever or excess sputum production. Id. Dr. Littman again noted that Mr. Ensor's past history included COPD, frequent PVCs and an episode of syncope with presumed ventricular tachycardia. Id. Further, Dr. Littman added Mr. Ensor "was previously a smoker but has not smoked in many years." Id. Dr. Littman observed that Mr. Ensor's heart revealed "difficult to locate PMI with distant heart tones but a regular rate and rhythm, soft S4, presplitting with the second heart tone, and no definite S3." Id. Dr. Littman examined Mr. Ensor's lungs which revealed a "markedly increased AP diameter with expiratory greater than inspiratory wheezing and scattered rhonchi." Id. Dr. Littman's discharge summary provided that Mr. Ensor was treated for COPD and that Mr. Ensor's chest X-ray "showed severe COPD and scarring consistent with the patient's previous history of pneumoconiosis." (DX-5, p. 37). Dr. Littman's final diagnoses included: (1) chest pain, most likely musculoskeletal etiology; (2) exacerbation of COPD; and (3) frequent PVCs. Id.

Dr. Littman last saw Mr. Ensor during January and February 1990, when Mr. Ensor was admitted for declining mental status, hearing loss, confusion, and memory loss. (DX-5, pp. 38-41). Dr. Littman initially diagnosed Mr. Ensor with "coal miner's pneumoconiosis and end stage [COPD]." (DX-5, p. 41). Dr. Littman noted that Mr. Ensor's past history was "significant for severe [COPD] and probably coal miner's pneumoconiosis." (DX-5, p. 40).

Dr. Littman also noted that Mr. Ensor was "positive for smoking in the past." Id. In the discharge summary, Dr. Littman made the following final diagnoses: (1) respiratory arrest secondary to severe obstructive lung disease; (2) coal miner's pneumoconiosis; (3) exacerbation of COPD with most likely hospital acquired pseudomonas infection; (4) borderline hyponatremia; (5) Alzheimer's disease; and (6) Malnutrition.

B. Dr. Gregory Fino

Dr. Gregory J. Fino, board-certified in internal medicine and the subspecialty of pulmonary diseases, examined the medical records and provided a report of his conclusions on February 17, 2000. (DX-13, pp. 1-38). Dr. Fino reviewed the records to determine whether occupational pneumoconiosis was present and to determine whether or not a respiratory impairment or disability was present. Id., p. 9. Dr. Fino opined that Mr. Ensor did not suffer from an occupationally acquired pulmonary condition as a result of coal mine dust exposure based on three reasons. Id., p. 10.

First, Dr. Fino noted that the majority of chest X-ray readings were negative for pneumoconiosis. Id. He observed that the chest X-ray readings were not normal; however there were no "B" readings of the X-rays; the congestive heart failure exhibited on many of the films is not a coal mine dust related condition; the interstitial scarring and the fibrosis described by some readers are not consistent with coal mine dust inhalation; and there were no documented "rounded opacities in the upper zones, which would be necessary to make a diagnosis of pneumoconiosis by chest X-ray." (DX-13, p. 20)

Dr. Fino also stated that there was no valid, objective pulmonary function evidence of a coal mine dust related disease. Id. Further, Dr. Fino indicated that the hypercarbia (or increase in the pO2) which was seen on the arterial blood gases is not consistent with coal mine dust inhalation. Id.

According to Dr. Fino, the diagnosis of coal mine dust-related disease cannot be established by a mere history of respiratory complaints and physical examination. Id, p. 11. Dr. Fino explained that shortness of breath, exercise intolerance, and abnormal physical findings are non-specific. Id. Dr. Fino observed that hundreds of different diseases, including non-pulmonary conditions can produce the same symptoms and physical findings as pneumoconiosis. Id. Consequently, Dr. Fino reiterated that objective tests (which are absent in this case) are absolutely essential to distinguish pneumoconiosis from non-occupational pulmonary disorders. Id. Dr. Fino added that objective testing is also crucial to determine the presence or absence of a pulmonary

impairment. Id.

Dr. Fino observed:

> From a functional standpoint, this man's pulmonary system was described as abnormal. There was no objective evidence of a respiratory impairment as no lung function testing was performed. However, the resting arterial blood gases which showed hypercarbia suggest significant chronic obstructive pulmonary disease.... He did not retain the physiologic capacity, from a respiratory standpoint, to perform all of the requirements of his last job. There were two risk factors for this disability – coal mine dust exposure and smoking. In this instance, the clinical information is consistent with a smoking related disability.

(DX-13, p. 12). According to Dr. Fino, even if industrial bronchitis due to coal mine employment contributed to the obstruction, the loss in the FEV_1 would be in the 200 cc range. Id. Dr. Fino added, "if we gave back to [Mr. Ensor] that amount of FEV_1, [he] still would have been disabled." Id.

Dr Fino's report ended with the following conclusions: (1) There is insufficient medical evidence to justify a diagnosis of simple coal worker's pneumoconiosis; (2) in Dr. Fino's opinion, Mr. Ensor did not suffer from an occupationally acquired pulmonary condition; (3) there was a disabling respiratory impairment due to smoking; (4) Mr. Ensor's death was due to smoking related lung disease; (5) coal mine dust exposure did not cause, contribute to, or hasten death; and (6) assuming Mr. Ensor had pneumoconiosis, it did not contribute to his disability or death, because he would have been as disabled and would have died in the same manner and at the same time had he never stepped foot in the mines. (DX-13, p. 23).

C. Smoking History

On March 18, 1988, Dr. Littman noted that Mr. Ensor was "positive for heavy smoking in the past." (DX-5, p. 14). Likewise, on November 19, 1989, Dr. Littman again noted that Mr. Ensor "was previously a smoker but had not smoked in many years." (DX-5, p. 31). Mrs. Ensor testified that Mr. Ensor smoked unfiltered Camel cigarettes from 1965 until about 1980. (Tr. 28-29). Additionally, the transcript provides:

> Q Okay. But did Dr. Littman ever tell you anything about [Mr. Ensor's] smoking being associated with his shortness of breath?

> A He asked me – he wanted to know, same as you, how much he had been smoking and what his – you know, what his job was at that point in time, and I told him he had been working in the mines. And so he said, well, you know, that's probably some of the cause for whatever was wrong with him. So I'm not sure. I can't just say honestly he said, yeah, it was smoking, or yes it was definitely black lung.

(Tr. 29-30).

D. Death Certificate

The death certificate of Mr. Ensor was certified by Dr. Littman on February 7, 1990. (DX-4). Dr. Littman identified the immediate cause of death as (1) respiratory arrest and underlying causes as (2) Severe COPD and (3) coal miner's pneumoconiosis. Id.

DISCUSSION

Mrs. Ensor must prove that Mr. Ensor suffered from pneumoconiosis. As mentioned above, pneumoconiosis is defined by 20 C.F.R. § 718.201 as clinical pneumoconiosis and legal pneumoconiosis.

1. Clinical Pneumoconiosis

There is no autopsy or biopsy evidence in the record, nor is there any evidence in the record that either were performed. Likewise, the original X-ray films which were lost or destroyed are not in the record. The radiographic evidence in this case thus amounts only to the five reports generated during Mr. Ensor's visits to the hospital from 1988 until 1990. Further, there are no pulmonary function studies of record.

Neither of the two roentgenologists who generated any of the X-ray reports indicated the presence of pneumoconiosis;[97] however,

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[97] OWCP argued that Dr. Fino's statement that "the majority of chest x-ray readings were negative for pneumoconiosis" is a misleading if not false statement, because the physicians at the time of their interpretations, were not reviewing the x-rays specifically for a determination of the existence or non-existence of pneumoconiosis. (DX-15, p. 1). OWCP explained that "four of the five readings denoted lung abnormalities that could have, in fact, represented findings of occupational pneumoconiosis." Id. No further evidence has been introduced supporting the proposition that the reports do, in fact,

in November 1989, Dr. Littman, noted that the severe COPD and scarring discussed in the X-ray reports were consistent with Mr. Ensor's previous history of pneumoconiosis. Meanwhile, Dr. Fino, a pulmonary specialist, disputed the conclusion that Mr. Ensor suffered from pneumoconiosis and concluded that Mr. Ensor's smoking history was the cause of Mr. Ensor's suffering. The consensus among courts has been that an agency adjudicator may give weight to the treating physician's opinion when doing so makes sense in light of the evidence and the record, but may not mechanistically credit the treating physician solely because of his relationship with the claimant.[98]

Giving Dr. Littman's opinion more weight as the treating physician is inappropriate in light of the evidence and record. According to the record, Dr. Littman treated Mr. Ensor for respiratory and pulmonary conditions a total of four times over two

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represent findings of occupational pneumoconiosis.

[98] Nat'l Mining Ass'n v. Dep't of Labor, 292 F.3d 849, 861 (D.C. Cir. 2002). In Jericol Mining, Inc. v. Napier, 2002 WL 1988221 *5 (6th Cir. 8/30/2002), the court followed this principle as determined by the D.C. circuit. Additionally, in Jericol, the court discussed jurisprudence regarding weighing a treating physician's opinion:

> This court recently addressed the issue of whether a treating physician's opinion is entitled to additional weight in Peabody Coal Co. v. Groves, 277 F.3d 829 (6th Cir. 2002) (Groves). After recognizing that Tussey v. Island Creek Coal Company, 982 F.2d 1036 (6th Cir. 1993), "confirmed that the 'opinions of treating physicians are entitled to greater weight than those of non-treating physicians,'" Groves rejected the contention that Tussey requires an ALJ to give absolute deference to the opinion of a treating physician. Groves, 277 F.3d at 834 (quoting Tussey, 982 F.2d at 1042) (refusing to accept Peabody Coal Company's argument that Tussey established a treating-physician presumption that is contrary to the requirements of the APA). Instead, Groves clarified that "Tussey requires ALJs in black lung cases to examine the medical opinions of treating physicians on their merits and to make a reasoned judgment about their credibility. These opinions should be '[g]iven their proper deference.'" Id. (quoting Tussey, 982 F.2d at 1042).

Id.

years. The record does not reflect whether the two-year span of Dr. Littman's treatment relationship allowed Dr. Littman to observe Mr. Ensor long enough to obtain a superior understanding of Mr. Ensor's condition. Likewise, the record does not establish whether the four visits to the hospital allowed Dr. Littman to observe Mr. Ensor often enough to obtain a superior understanding of Mr. Ensor's condition. Further, the extent of Mr. Ensor's treatment does not suggest Dr. Littman is in a position of superior understanding of Mr. Ensor's condition. Additionally, Mr. Ensor's medical records and Dr. Littman's treatment notes, observations, and diagnoses were made available to Dr. Fino for Dr. Fino's review of the entire medical record. Accordingly, Dr. Littman was not in sole possession of any unique medical information concerning Mr. Ensor's pulmonary condition.

Even if Dr. Littman's relationship with Mr. Ensor justified giving more weight to Dr. Littman's opinion than the other physicians, Dr. Littman's finding does not appear to be supported by a reasoned medical opinion. In evaluating medical opinions, an administrative law judge must first determine whether opinions are based on objective documentation and then consider whether the conclusions are reasonable in light of that documentation. A well-documented opinion is based on clinical findings, physical examinations, symptoms, and a patient's work history.[99] For a medical opinion to be "reasoned," the underlying documentation and data should be sufficient to support the doctor's conclusion.[100] Lastly, an opinion may be given little weight if it is vague or equivocal.[101]

Although Dr. Littman was in the unique position to develop a well-documented and reasoned medical opinion as Mr. Ensor's treating physician, his opinion is entitled to little probative weight. First, his opinion is not based on any autopsy or biopsy reports or other objective tests performed to establish the presence of pneumoconiosis. Dr. Littman first offered a discussion of Mr. Ensor's previous history of pneumoconiosis on Mr. Ensor's third visit to the hospital in November 1989. Prior to that visit, during March 1988, Dr. Littman noted Mr. Ensor's heavy smoking in the past without any reference to pneumoconiosis. In December 1988, Dr. Littman did not discuss any smoking history or pneumoconiosis. During Mr. Ensor's November 1989 visit to the hospital, Dr. Littman again addressed Mr. Ensor's smoking, noting

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[99] Fields v. Island Creek Coal Company, 10 BLR 1-19 (1987).

[100] Id.

[101] See Griffith v. Director, OWCP, 49 F.3d 184 (6th Cir. 1995); Justice v. Island Creek Coal Co., 11 BLR 1-91 (1988).

that Mr. Ensor quit many years ago. During Mr. Ensor's final stay at the hospital, Dr. Littman mentioned smoking in his report, but he diagnosed Mr. Ensor with coal miner's pneumoconiosis without discussing any reason or basis why that finding was appropriate. Further, his final diagnoses failed to discuss the impact of Mr. Ensor's smoking history, if any, upon Mr. Ensor's health.

Second, Dr. Littman's reports appear equivocal and vague. Specifically, Dr. Littman saw Mr. Ensor in November 1989 and noted Mr. Ensor had a history of "palpable" coal miner's pneumoconiosis. No further discussion of Mr. Ensor's coal mine employment is provided. Upon discharge from that visit, Dr. Littman found the X-ray reports showed scarring consistent with Mr. Ensor's history of pneumoconiosis, but he diagnosed Mr. Ensor with chest pain, exacerbation of COPD, and frequent PVCs. Upon Mr. Ensor's final visit in 1990, Dr. Littman noted Mr. Ensor's past history was significant for severe COPD and "probably" coal miner's pneumoconiosis, yet Dr. Littman diagnosed pneumoconiosis without further explanation or reason. Consequently, without any objective data, clinical findings or other facts underlying his conclusions, Dr. Littman's opinion that Mr. Ensor had pneumoconiosis is entitled to little probative value.

Dr. Fino opined that Mr. Ensor did not suffer from an occupationally acquired pulmonary condition based on the X-ray evidence or the blood gas studies, which were consistent with smoking related diseases. Dr. Fino's superior qualifications and his opinions supported by the medical record, are entitled to greater weight. Accordingly, the preponderance of the probative evidence does not support a finding of clinical pneumoconiosis.

2. Legal Pneumoconiosis

The medical evidence suggests Mr. Ensor struggled with other pulmonary disorders. Dr. Littman found evidence of severe COPD and bronchitis. Likewise, Dr. Fino found Mr. Ensor's medical record suggested significant COPD. Because the legal definition of pneumoconiosis extends to any lung impairment that is related to or is aggravated by coal dust exposure, I must determine whether Mr. Ensor's respiratory ailments had any connection to his coal mine employment.

None of Dr. Littman's examination reports clarifies whether the coal miner's pneumoconiosis which he believed caused Mr. Ensor's death was related to or aggravated Mr. Ensor's COPD or bronchitis. Moreover, none of Dr. Littman's observations discusses any link between Mr. Ensor's lung ailments and coal dust. As previously discussed, Dr. Littman's diagnoses of pneumoconiosis are not well-reasoned because the record is devoid of medical support

therefor and contains no explanation by Dr. Littman of how he arrived at those diagnoses. Further, none of the X-ray reports implicate any relationship between the lung diseases and coal dust, nor do they suggest any aggravation of the ailments by exposure to coal mine dust.

Dr. Fino specifically opined that there is insufficient medical evidence to document the presence of a coal mine dust disease. Rather, Dr. Fino concluded Mr. Ensor's pulmonary condition and respiratory ailments were related to smoking and smoking-related lung disease. According to Dr. Fino, the blood gas abnormalities exhibited by Mr. Ensor were consistent with and very common in smoking-related diseases. Dr. Fino opined that coal mine dust did not cause, contribute to, or otherwise hasten Mr. Ensor's death. Dr. Fino's superior credentials merit greater probative value, and he stands alone in establishing any link or absence thereof between Mr. Ensor's impairments and exposure to coal mine dust. Consequently, the preponderance of the probative evidence in the record does not support a finding that Mr. Ensor's chronic pulmonary disease or respiratory impairments were significantly related to or substantially aggravated by dust exposure in coal mine employment.

Etiology of the Miner's Pneumoconiosis

The record insufficiently establishes Mr. Ensor suffered from pneumoconiosis; however, if he suffered from the disease, the next element Mrs. Ensor must prove is whether the disease arose out of Mr. Ensor's coal mine employment. From the record, Mr. Ensor worked three years in coal mines, as discussed above. If a miner suffers from pneumoconiosis and was employed less than ten years in the nation's coal mines, it shall be determined that such pneumoconiosis arose out of that employment only if competent evidence establishes such a relationship.[102] 20 C.F.R. § 718.201(b) provides:

> For the purposes of this section, "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment <u>significantly related to, or substantially aggravated by</u>, dust exposure in coal mine employment.

The Sixth Circuit also recognizes a lesser burden under 20 C.F.R. § 718.203(a) that requires the miner to establish only that his

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[102] 20 C.F.R. § 718.203(c).

pneumoconiosis arose "in part" from his coal mine employment.[103] The record must contain medical evidence establishing the relationship between pneumoconiosis and coal mine employment, and an administrative law judge cannot reasonably infer a relationship based merely upon claimant's employment history.[104] Further, sole reliance on lay testimony to find 20 C.F.R. § 718.203(c) satisfied is erroneous.[105]

The record does not include medical evidence sufficient to establish a relationship between pneumoconiosis and coal mine employment under 20 C.F.R. § 718.201 or under the less demanding 20 C.F.R. § 718.203(a) standard. Although Dr. Littman was in a position to afford a well-reasoned opinion, his notes preclude a finding that Mr. Ensor's arguable pneumoconiosis would have arisen, even in part, out of his coal mine employment. Dr. Littman never discussed Mr. Ensor's coal mine employment in relation to any of his diagnoses of pneumoconiosis, chronic pulmonary diseases and respiratory or pulmonary ailments. Moreover, Dr. Littman failed to offer any discussion of the extent or nature of Mr. Ensor's coal mine employment in his reports or diagnoses.

Dr. Fino, on the other hand, concluded Mr. Ensor's pulmonary condition and respiratory ailments were related to smoking and smoking-related lung disease. According to Dr. Fino, the blood gas abnormalities exhibited by Mr. Ensor were consistent with and very common in smoking-related diseases. Dr. Fino opined that Mr. Ensor did not suffer from any occupationally acquired pulmonary condition. Dr. Fino's superior credentials warrant greater probative value, and his opinion establishes the absence of any link between coal mine employment and pneumoconiosis. Consequently, the preponderance of the probative evidence in the record does not support a finding that Mr. Ensor's pneumoconiosis or chronic pulmonary disease and respiratory impairments would have arisen even in part out of his coal mine employment.

Death Due to Pneumoconiosis

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[103] Southard v. Director, OWCP, 732 F.2d 66, 70 (6th Cir. 1984). 20 C.F.R. § 718.203(a) provides in pertinent part:

> In order for a claimant to be found eligible for benefits under the Act, it must be determined that the miner's pneumoconiosis arose at least in part out of coal mine employment.

[104] Baumgartner v. Director, OWCP, 9 BLR 1-65 (1986).

[105] Tucker v. Director, OWCP, 10 BLR 1-35, 1-39 (1987).

If the record could arguably support Mrs. Ensor's claim regarding the existence of pneumoconiosis and the etiology of the disease, the last element Mrs. Ensor must prove is whether Mr. Ensor's death was due to pneumoconiosis. As previously discussed, the regulations provide four means for showing death due to pneumoconiosis. Because there is insufficient evidence of complicated pneumoconiosis in this case, Mrs. Ensor may not proceed under the statutory presumption of causation. Consequently, she must show Mr. Ensor's death was caused by pneumoconiosis, or his death was caused by complications of pneumoconiosis, or pneumoconiosis was a substantially contributing cause or factor leading to Mr. Ensor's death.

Dr. Fino and Dr. Littman offer differing opinions regarding Mr. Ensor's death. Dr. Littman, who was the treating physician when Mr. Ensor died, indicated on the death certificate that the cause of death was respiratory arrest, severe COPD, and coal miner's pneumoconiosis. (DX-4). Dr. Littman had an opportunity to provide the most probative opinion regarding cause of death; however, his opinion is entitled to little value for reasons discussed above. Specifically, Dr. Littman's opinion is not well-documented because there is no evidence that an autopsy or biopsy were ever performed on which he could base such an opinion. Dr. Littman failed to check the box regarding whether an autopsy was performed or whether the results of an autopsy were available before the completion of the death certificate. Id. To the contrary, the record reflects an autopsy was not performed at all. (DX-10, p. 5). Accordingly, Dr. Littman's conclusion is not well-reasoned. Moreover, he did not explain what factors led to his determination that black lung caused Mr. Ensor's death. Dr. Littman did not offer any opinion regarding whether Mr. Ensor's death was caused by complications from pneumoconiosis or whether Mr. Ensor's death was hastened by pneumoconiosis.

Dr. Fino opined Mr. Ensor died from smoking-related lung diseases. According to Dr. Fino, the blood gas abnormalities exhibited by Mr. Ensor were consistent with and very common in smoking related diseases. Dr. Fino opined that coal mine dust did not cause, contribute to, or otherwise hasten Mr. Ensor's death. According to Dr. Fino, even if Mr. Ensor would have suffered from pneumoconiosis, he would have been as disabled and would have died in the same manner and at the same time had he never stepped foot in the mines. Dr. Fino thus asserted Mr. Ensor's death was not caused by pneumoconiosis, complications due to pneumoconiosis, or hastened by pneumoconiosis. I place greater weight on Dr. Fino's opinion because of Dr. Fino's superior credentials and the consistency of his medical opinions with Mr. Ensor's smoking history and medical record. Accordingly, I find that the preponderance of probative evidence fails to establish that Mr.

Ensor died from pneumoconiosis. Likewise, the evidence is insufficient to prove that Mr. Ensor's death was due to complications from pneumoconiosis or that his death was hastened by pneumoconiosis.

Entitlement:

I find that Mrs. Ensor is an eligible survivor, but she is not entitled to benefits under the Act because Mrs. Ensor has failed to establish: (1) the existence of pneumoconiosis; (2) Mr. Ensor acquired pneumoconiosis at least in part from working in the coal mines; and (3) Mr. Ensor's death was due to pneumoconiosis, was caused by complications due to pneumoconiosis, or hastened by pneumoconiosis.

Attorney's Fees:

The award of an attorney's fee is permitted only in cases in which the claimant is found to be entitled to the receipt of benefits. Because the benefits are not awarded in this case, the Act prohibits the charging of any attorney's fee to the claimant for legal services rendered in pursuit of benefits.

ORDER

It is therefore **ORDERED** that the claim of Clara Faye Ensor for benefits under the Act is **DENIED**.

ORDERED this 17th day of September 2002 at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge